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Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 8/2016*, **

Submitted by:	Y.M. (represented by counsel, Albert Parés Casanova)
Alleged victim:	Y.M.
State party:	Spain
Date of communication:	16 December 2016
Date of decision:	31 May 2018
Subject matter:	Determination of the age of an alleged unaccompanied minor
Procedural issues:	Non-exhaustion of domestic remedies; abuse of the right of submission
Articles of the Convention:	3, 8, 12, 18 (2), 20, 27 and 29
Articles of the Optional Protocol:	7 (c), (e) and (f)

* Adopted by the Committee at its seventy-eighth session (14 May–1 June 2018).

** The following members of the Committee participated in the consideration of the present communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Kirsten Sandberg, Anne Marie Skelton, Velina Todorova and Renate Winter. Pursuant to rule 8 (1) (a) of the Committee's rules of procedure under the Optional Protocol, Committee member Jorge Cardona Llorens did not participate in the consideration of the communication.

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1.1 The author of the communication is Y.M., an Algerian citizen who claims to have been born on 9 December 1999. He claims that he is a victim of violations of his rights under articles 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 In accordance with article 6 of the Optional Protocol, on 23 December 2016, the Working Group on Communications, acting on behalf of the Committee, requested that the State party refrain from returning the author to his country of origin and that it transfer him to a child protection centre while his case was under consideration by the Committee.

1.3 On 14 March 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request to consider the admissibility and merits of the communication separately.

Factual background[1]

2.1 On 2 November 2016, the Spanish National Police intercepted the small boat in which the author was travelling in his attempt to land illegally on Lanzarote, one of the Canary Islands. When he was arrested, the author, who was undocumented, stated that he was a minor.

2.2 On the same day, the Public Prosecution Service of Almería Province ordered medical tests to determine the author's age. The tests, which consisted of an X-ray of the author's left hand, were done at the Torrecárdenas hospital in the city of Almería. The results of the X-ray, dated 3 November 2016, showed that, according to the Greulich and Pyle atlas,[2] the author's bone age was 18 and that there was no standard deviation from that age range.[3]

2.3 On 3 November 2016, the Ministry of the Interior issued an order to return the author to his country of origin.

2.4 On 4 November 2016, the Public Prosecution Service of Almería Province adopted a decree that, based on the results of the X-ray, found provisionally that the author was an adult. The author submits that the decree cannot be challenged in court and that, as a result, he has exhausted all available domestic remedies.[4]

2.5 On the same day, Court of Investigation No. 6 of Almería ordered that the author be admitted to a holding centre for foreign nationals for a period of no more than 60 days, pending the execution of the expulsion order. The author was taken to the holding centre in Barcelona. On admission, the author again stated that he was a minor, so the police at the facility sent a fax informing the juvenile section of the Public Prosecution Service of Barcelona Province of the situation.

2.6 On 8 November 2016, the juvenile section ruled that no age-determination procedures were called for, as there was no reasonable doubt about the author's age, and closed the case.

2.7 On 23 November 2016, the author lodged a complaint with the Catalonia headquarters of the Spanish National Police. In the complaint, which included a copy of his national identity card,[5] he again claimed that he was a minor. The complaint was forwarded

[1] The factual background described in paragraphs 2.1 to 2.7 is based on information provided by the author in his initial communication. The factual background described in paragraphs 2.8 to 2.11 is based on information provided by the State party in its observations of 22 February 2017 and 13 July 2017.

[2] An age-determination method that involves comparing an X-ray of a person's non-dominant hand against a collection of X-rays of hands categorized by age of the person concerned.

[3] The author has submitted a copy of the medical certificate.

[4] The author notes that, in decision No. 172/2013 of 9 September 2013, the First Chamber of the Constitutional Court stated clearly that age-determination decrees issued by a public prosecution service could not be appealed in court.

[5] The author provides a copy of the card, which is of poor quality and has a photograph of an unrecognizable person.

to the Public Prosecution Service of Barcelona Province, Court of Investigation No. 6 of Almeria and the government of Catalonia.

2.8 On 25 November 2016, the Public Prosecution Service found that the illegible photocopy of the identity card did not nullify the information contained in the decree of 4 November 2016, according to which the author was an adult.

2.9 Also on 25 November, the author submitted an application for international protection in Spain.

2.10 On 1 December 2016, the author applied to Court of Investigation No. 6 of Almeria for protective measures consisting of the suspension of his deportation and his transfer to a child protection centre. On 2 December 2016, the Court requested a report from the Public Prosecution Service of Almeria Province, which concluded on 12 December that the copy of the identity document provided by the author, whose poor quality made it hard to read and easy to tamper with, did not invalidate the results of the objective medical tests.

2.11 On 16 December 2016, the Ministry of the Interior rejected the author's application for reconsideration of the deportation order to which he was subject and his application for international protection.

Complaint

3.1 The author maintains that during the age assessment he underwent, no consideration was given to the best interests of the child, in violation of article 3 of the Convention. He notes that, according to the Committee, the State party does not have a uniform national process for protecting unaccompanied minors. Age-determination methods, for instance, vary from one autonomous community to another.[6]

3.2 The author notes that the only methods of age determination currently used in Spain are medical estimates and estimates based on a person's physical characteristics. Other methods, such as psychosocial and developmental estimates and estimates drawing on available documentation, knowledge and local information, are not used. He adds that the main method used in Spain is the radiological test based on the Greulich and Pyle atlas, a 1950s study of a sample of 6,879 healthy children of upper-middle-class background from the United States of America. The test makes it possible to estimate the age range within which a person falls. The author maintains that the study, like other studies done later, is merely indicative and that it was not initially considered a method of determining a person's chronological age. The author notes the need to differentiate between chronological age and bone age, which is a statistical concept that, developed through clinical experience, is useful for strictly medical purposes, such as the estimation of the pace of a person's bone maturation or predictions about how tall a person will be. Chronological age, however, is the length of time a person has lived. Bone age and chronological age are not necessarily the same, as a child's growth and development can be affected not only by genetic, pathological, nutritional, hygienic and health factors reflecting his or her social status but also by racial factors. According to a number of studies, a person's socioeconomic status is a key determinant of his or her bone development.

3.3 The author submits that the best interests of the child should be the primary consideration throughout an age assessment and that only necessary medical tests, compatible with medical ethics, should be carried out. The resulting medical reports should always indicate the margin of error. In addition, X-rays should be taken and read by medical personnel specialized in reading X-rays, and the overall assessment of the results should be carried out not, as often occurs, by radiology departments, but by medical personnel specialized in legal and forensic medicine.[7] Lastly, age assessments should draw on a variety of pieces of supplementary evidence and tests. He adds that pursuant to article

[6] The author refers to the Committee's concluding observations on the combined third and fourth periodic reports of Spain (CRC/C/ESP/CO/3-4, paras. 27 and 59). He also refers to the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin (para. 31).

[7] The author cites a 2011 report of the Síndic de Greuges (the Ombudsman of Catalonia) on the process of assessing the age of unaccompanied foreign minors.

35 of Organic Act No. 4/2000,[8] testing to determine a child's age should not be carried out when he or she is in possession of identity papers.[9]

3.4 The author claims to be a victim of a violation of article 3 of the Convention, read in conjunction with articles 18 (2) and 20 (1), as he was not assigned a guardian or representative, a practice that is a key procedural guarantee of respect for the best interests of the unaccompanied child.[10] The author submits that, on having been declared an adult on the basis of unreliable evidence and with no consideration given to the documentation duly issued by his country of origin, he has been left defenceless, without the protection he is owed by the State party. He is thus left in a situation of extreme vulnerability.

3.5 The author maintains that the State party, by failing to consider his identity papers as valid — despite not initiating any proceedings for forgery — has violated his right to preserve his identity, enshrined in article 8 of the Convention. He notes that age is a fundamental aspect of identity and that the State party has an obligation not to undermine his identity, as well as to preserve and recover the elements thereof.

3.6 The author also alleges a violation of article 20, since he was not afforded the protection he was owed by the State party as a child deprived of his family environment.

3.7 Lastly, the author claims that he is a victim of a violation of his rights under articles 27 and 29, as the failure to assign a guardian to look after his interests impeded his proper development.

State party's observations on admissibility

4.1 In its observations of 22 February 2017, the State party submits that, as the author is an adult, the communication is inadmissible under article 7 (c) of the Optional Protocol. It notes that the author did not submit to the Spanish authorities an official identity document with biometric data that could prove that he was not trying to falsify his identity. Furthermore, the complainant initially stated that he had been born on 9 December 1997 but later claimed to be a minor, a contradiction that justified medical tests to determine his age.

4.2 With regard to the reliability of medical tests to determine a person's age, the State party cites the case of *M.E.B. v. Spain*, in which the Committee considered a communication from an author who claimed that he was a minor despite the existence of X-ray evidence to the contrary.[11] After police investigations conducted by Spain in the author's country of origin, it was found that he had attempted to steal another person's identity and that he was really 20 years old. The State party submits that, if the X-ray evidence proved reliable in that case, it should be considered reliable in this case. X-ray evidence cannot be called into question by a bad photocopy of unknown provenance, submitted out of the blue, and in which the photograph of the bearer is unclear and the references to his identity and age are unreadable. The State party notes that the author has not yet provided his original identity papers, despite being in a position to do so through his lawyer.

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[8] Article 35 (3) of Organic Act No. 4/2000 of 11 January, on the rights, freedoms and social integration of foreign nationals in Spain, states:

> In the event that the State law enforcement or security agencies locate an undocumented foreign national whose status as a minor cannot be established with certainty, the relevant child protection services shall immediately provide the necessary care, as established in the legislation on the legal protection of minors, and the case shall be brought to the immediate attention of the Public Prosecution Service, which, in collaboration with the relevant health institutions, shall conduct the necessary tests on a priority basis to determine the person's age.

[9] The author also cites the report "*Ni ilegales ni invisibles. Realidad jurídica y social de los menores extranjeros en España*" (2009) of the United Nations Children's Fund (UNICEF) and the General Council of Spanish Lawyers, with the support of the Banesto Foundation, and "*Aproximación a la protección internacional de los menores extranjeros en España*" (2009), a report by the Office of the United Nations High Commissioner for Refugees (UNHCR), La Merced-Migraciones-Mercedarios, Save the Children, Baketik, Asociación Comisión Católica Española de Migración and the Santander Programme on Minors and the Law at the University of Comillas.

[10] The author cites the Committee's general comment No. 6 (2005), para. 21.

[11] CRC/C/75/D/9/2017. A decision was made to discontinue consideration of the communication.

4.3 The State party indicates that the communication and the request for interim measures were not received in Spain until 27 December 2016, by which time the author had already returned to his country of origin. It had therefore been impossible to comply with the interim measures adopted by the Committee and suspend his deportation. Nevertheless, the State party has reviewed the author's case file and concluded that no extraordinary circumstances or risk of irreparable harm have been brought to light and that there is no credible evidence of the unreliability of the medical test, the results of which indicate that the author is an adult.

Author's comments on the State party's observations on admissibility

5.1 In his comments of 1 March 2017, the author states that although a lawyer was appointed to him to provide him — as an adult — with assistance in connection with the deportation proceedings, he was at no time appointed a representative of his own choosing to defend his interests as a minor, in violation of article 12 of the Convention.

5.2 The author insists on the unreliability of medical assessments of a person's age that are based on the Greulich and Pyle atlas and maintains that, in the determination of his age, he was denied the benefit of the doubt, which, according to the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, he should have been accorded.[12] He maintains that unaccompanied foreign children should be entrusted to the child protection services even before their age is determined. The author adds that at no time did he state he had been born on 9 December 1997. He had at all times claimed that he was a minor since his arrival.

5.3 The author notes that the Public Prosecution Service of Barcelona Province had not reconsidered his case, but had upheld the conclusion of the Public Prosecution Service of Almeria Province and refused to order supplementary age assessments.

5.4 The author notes that the identity document he submitted was of poor quality because it had been faxed to the International Committee of the Red Cross, an institution that helps detainees at the holding centre for foreign nationals in Barcelona. The author notes that the validity of the document could have been ascertained by consulting the Algerian consulate in Barcelona.

State party's observations on admissibility and the merits

6.1 In a submission dated 13 July 2017, the State party reiterates its arguments on admissibility. It maintains that on his arrival in Spain, the author, in the presence of an interpreter and assisted by a public defender, voluntarily stated that he was Algerian and that he had been born on 9 December 1997. The same date was indicated by the author in the interview conducted as part of his application for asylum.

6.2 The State party notes that the author's detention in the Barcelona holding centre was reported to the Algerian consul in Barcelona on the day it took place and that the consul, after consulting official databases, issued the author with a temporary passport (a laissez-passer) for his possible return. The laissez-passer contained his picture and showed his date of birth as 9 December 1997.

6.3 The State party notes that in his application for international protection of 25 November 2016, the author stated that he had never had a passport or identity card. The State party notes that the author was assisted by an interpreter and an appointed lawyer who were specialized in completing applications for asylum. It adds that the Office of the Representative in Spain of the United Nations High Commissioner for Refugees, which conducted a detailed study of the author's file, twice indicated that it would be inappropriate to grant him asylum.

6.4 The State party contends that the communication is inadmissible because the domestic remedies available to the author have not been exhausted. First, the author could

[12] The author cites paragraph 31 (i) of general comment No. 6 (2005) and paragraph 51 of the European Parliament resolution of 5 February 2009 on the implementation in the European Union of Directive 2003/9/EC.

apply to the Public Prosecution Service for additional medical tests to confirm his age. It notes, in this respect, that the Constitutional Court has stated that age assessments undertaken by the Public Prosecution Service are highly provisional. Second, the author could petition the civil court of the place in which he was detained for a review of any finding by the autonomous community that he was an adult, in accordance with article 780 of the Civil Procedure Act. Third, the author could challenge the deportation order and the rejection of his application for asylum before the administrative courts. Finally, pursuant to article 239.1 of the Civil Code, the author could file a legal application for the government of Catalonia to be appointed as his guardian.

6.5 The State party maintains that, as the author was an adult, keeping him in contact with minors who are in child protection centres would have been inappropriate, as so doing might entail a serious risk to the children in them.

6.6 With regard to the author's arguments on his right to an identity, the State party notes that proof of identity, which should be based on documents that guarantee that no one else's identity has been used, is precisely the point at issue. In accordance with article 25 of the Aliens Act, this probative value is accorded to a passport or other travel document attesting to a person's identity considered valid under international agreements signed by Spain.

6.7 Lastly, the State party reiterates its assertions regarding the implementation of the interim measure seeking the suspension of the deportation of the author. It notes that it took the Committee five days to process the communication and that, even if it had been received on 23 December in Madrid, reconsideration of the enforcement of the deportation order would have taken a certain amount of time. It adds that the author did not put forward any extraordinary circumstances, such as being in possession of an original passport showing that he was a minor, that would have justified the suspension. Furthermore, there is no proof that the deportation of a child to his or her country of origin, if it is a safe country, is an act of irreparable harm.

Author's comments on the State party's observations on admissibility and the merits

7.1 In his comments of 29 December 2017, the author contends that the medical test to determine his age was carried out without obtaining his consent and that he was not assisted by a lawyer during the age-determination process. He adds that the lawyer appointed for him did not at any time help him in person or interview him. In addition, the lawyer was appointed in Almeria, and the author was taken to Barcelona, thereby preventing him from readying an appeal.

7.2 The author notes that the only possible appeal against a deportation order is administrative, not judicial. As for challenging the detention order, the author says that the judge who issued the order was faxed the documentation the author had sent but did not respond to it. In any case, the detention order makes no mention whatsoever of the assessment of the author's age. The author also reiterates that the age-determination decrees issued by the Public Prosecution Service cannot be appealed through the courts.

7.3 The author notes that the deportation order does not show that he himself was the source of the information about his date of birth. He also notes that the document issued by the consulate of Algeria in Barcelona was to be used only to enter Algerian territory. At no time was it shown that the information provided by the Spanish police had been verified, as was made clear by the electronic message of apology sent by the consulate to the author's representative.[13]

[13] The author encloses a copy of his electronic message of 13 January 2017 to the Algerian consulate in Barcelona, noting that the author, who had an Algerian identity document attesting to his status as a minor, had been deported. Also attached is an electronic reply from the consulate, sent on the same date. It simply states: "I'm really sorry."

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, whether the communication is admissible.

8.2 The Committee notes that the purpose of the present communication is to establish whether the rights of the author, as an alleged minor, under the Convention were respected in the context of the age-determination procedure to which he was subjected. However, without expressing any view on the merits, the Committee observes that the Algerian consulate in Barcelona issued the author with a temporary passport (laissez-passer) that showed his date of birth as 9 December 1997, which is the same as the date given by the author on his asylum application. The Committee notes that, in the absence of any other information or evidence in the case file that would call into question the validity of this official document issued by the author's country of origin, the latter document can be presumed to be valid. In this connection, the Committee points out that the illegible photocopy of the author's alleged identity card that features an unclear photograph of the bearer cannot serve as proof that the laissez-passer is invalid. The Committee therefore considers that the laissez-passer issued in the author's name proves that he was an adult on his arrival in Spain.

8.3 In the light of the foregoing, the Committee finds that the complaint is incompatible with the provisions of the Convention, which protects the rights of children, and inadmissible under article 7 (c) of the Optional Protocol.

9. The Committee on the Rights of the Child therefore decides:

(a) That the communication is inadmissible under article 7 (c) of the Optional Protocol;

(b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.